

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAMAR CAMPBELL,

Defendant-Appellant.

UNPUBLISHED

November 21, 1997

No. 196423

Recorder's Court

LC No. 95-014001

Before: Holbrook, Jr., P.J., and White and R. J. Danhof,* JJ.

PER CURIAM.

Defendant appeals by right his bench trial conviction for aggravated stalking, MCL 750.411i; MSA 28.643(9). Defendant was sentenced to two to five years' imprisonment for the conviction. We affirm.

An individual who engages in stalking is guilty of aggravated stalking if, while committing the unconsented contact, he does so in violation of a restraining order of which he has actual notice. MCL 750.411i(2)(a); MSA 28.643(9)(2)(a).

Defendant first argues that the trial court abused its discretion when it admitted a tape of brief telephone calls made by defendant to complainant without adequate foundation. We conclude the trial court did not err in admitting the tape of telephone conversations between complainant and defendant. Contrary to defendant's position, a proper foundation was laid for admission of the tape. MRE 901, which governs the admissibility of voice recordings, provides in pertinent part

(a) **General Provision.** The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

(b) **Illustrations.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

* * *

(5) *Voice Identification.* Identification of a voice, whether heard first hand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker. [MRE 901.]

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims it to be. *Meagher v Wayne State University*, 222 Mich App 700, 724; 565 NW2d 401 (1997). In *People v Berkey*, 437 Mich 400, 49-40; 467 NW2d 6 (1991), the Supreme Court explained the requirements of MRE 901 as applied to voice identifications:

For these reasons, we are satisfied that authenticity of an exhibit such as these tape recordings is to be determined in light of MRE 901. It follows that one may make a showing of authenticity in the manner undertaken in this case. *That is, a tape ordinarily may be authenticated by having a knowledgeable witness identify the voices on the tape. MRE 901 requires no more.* [*Id.* at 50. (emphasis added).]

In this case, complainant testified that she taped three telephone conversations with defendant, that she listened to the tape and that she recognized defendant's voice on the tape. Thus, the necessary testimony to authenticate the tapes pursuant to MRE 901 was elicited and, the trial court did not abuse its discretion in admitting the tape. *People v Jim Saliedine*, 152 Mich App 208, 217; 394 NW2d 22 (1986).

Next, defendant contends that the trial court abused its discretion when it permitted defendant's parole agent to testify to notes generated by a predecessor agent regarding when defendant received notice of the PPO. We disagree. We first observe that defendant failed to object at trial. Thus, we review for manifest injustice. *People v Turner*, 213 Mich App 558, 583; 540 NW2d 728 (1995). The records from defendant's parole file fall within the business record exception to the hearsay rule. MRE 803(6). Parole Agent Storment testified that parole agents keep records of communications made with "clients." He further testified that this was done in the regular course of business and that the records are normally made by someone who has actual knowledge of what has happened. Further, the notations to which Agent Storment testified were with respect to telephone calls received and made, documents received and communications with defendant, i.e., acts, transactions, occurrences, and/or events. The records fall within the definition of business records. MRE 803(6); *People v Safiedine*, 163 Mich App 2, 33; 414 NW2d 143 (1987). Further, it was not necessary that the actual preparer of the business records be present to lay the foundation for the admission of the contents of the documents. *Id.* The trial court did not abuse its discretion in admitting this evidence.

Defendant next argues that his conviction was based on flawed testimony because the complainant's testimony was so inconsistent as to be incredible. We disagree. While the testimony regarding dates did not fit neatly into place, and not all the testimony was consistent, the court, sitting as trier of fact, was free to reconcile the testimony in a manner consistent with all the evidence in the case. We find no error.

Finally, defendant claims that he was denied effective assistance of counsel. To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney as guaranteed by the Sixth Amendment. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). The deficiency must be prejudicial to the defendant. *Id.* Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Specifically, the defendant must overcome the presumption that the challenged action is sound trial strategy. *Daniel*, *supra* at 58.

Defendant has failed to overcome the presumption that he received effective assistance of counsel at trial. *People v Wilson*, 180 App 12, 17; 446 NW2d 571 (1989). Defendant has not shown that his trial counsel was ineffective for failing to adequately challenge the admissibility of the tape recording. Any objection to its admissibility would have been futile, and counsel is not required to make futile objections. *People v Tullie*, 141 App 156, 158; 366 NW2d 224 (1985). Further, defendant has not shown that the result would have been different had counsel made the points defendant argues he should have made.

Defendant also argues that trial counsel failed to adequately cross-examine complainant to reveal inconsistencies in her trial testimony and to attack her credibility. Any deficiency did not amount to a deprivation of counsel. Further, the trial court's decision did not rest on the complainant's credibility.

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Helene N. White

/s/ Robert J. Danhof